



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

ADDRESS OF HON. FRANK C. PARTRIDGE, OF VERMONT,
ON

The Relative Value of Authorities.

The committee of the American Society of International Law on the Codification of the Principles of Justice in Times of Peace between Nations, in its preliminary report to the last annual meeting upon the scope and plan of the report, suggested among other things the consideration of the relative value of authorities. The committee say:

There should also be considered critically and declared the relative value which should be given to authorities relied upon in defining and formulating in terms an abstract principle of justice or a rule of international conduct. Such a consideration and declaration should include, in more or less detail, (1) Custom; (2) Usage; (3) Conventional Provisions; (4) Diplomatic Agreements; (5) Decisions of International Tribunals and Commissions; (6) Writings of the Publicists; (7) Diplomatic and other State Papers; (8) Decisions of Municipal Courts; (9) Dicta of Judicial Tribunals; and (10) Municipal Legislation. It would be appropriate also to discuss at some length the proper force and authority to be given to Precedent in the determination of the rules, and its relation to Custom and Usage.

Although nearly all the publicists are in accord in the enumeration of the sources of international law, it is not the same in regard to their classification and relative importance.¹ Those writers who treat international law more as a code of morals naturally attach more weight to the writings of the great publicists. On the other hand, those who accept the legal nature of international law, which Doctor Scott so ably presents in his article by that title,² find very high authority in judicial decisions of international tribunals or even of municipal courts of the highest standing. A fundamental factor of necessity in the consideration of the relative value of international authorities must be the purpose for which the authority is desired.

¹ See note by Mr. Dana, Wheaton's International Law, 8th ed., p. 27; also Calvo's Droit International, 5th ed., Vol. I, p. 158.

² Vol. 1, No. 4, of the American Journal of International Law.

Is it for a court upon which to predicate a decision as to the existing law, or is it for a philosophical discussion of what the law ought to be?

The Committee on Codification has pointed out the basis for the proposed codification which appears to it to have such advantages as to warrant adoption. It is to declare "a principle of justice, which has been generally recognized by civilized states, and the concrete rules flowing from it, which have been sanctioned by conventional or other express assent" and then to set forth a series of suggestions "as to a wider application of the principle, or proposals as to changes or modifications of the accepted rules so that they will more nearly conform to a strict application of the declared principle." That is to say, to make the code "a union, to a certain degree, of the practical and the ideal" — "a declaration of practice and theory in the same set of rules."

The relative value of authorities for the purpose of declaring the principles of justice which have been generally recognized by civilized states as a part of international law is different from what it would be for the second phase of the task which the committee sets for itself. Before attempting any classification of the relative value of authorities for either purpose it is desirable to consider somewhat in detail the different so-called sources of international law.³

(1-2) Custom and usage in international law, as well as in municipal law, are often spoken of together, without making an exact distinction between the two. There is, however, a clear technical difference which should be borne in mind. That difference Professor Oppenheim clearly points out as follows:

Custom must not be confounded with usage. In every-day life and language both terms are used synonymously, but in the language of the jurist they have two distinctly different meanings. Jurists speak of a custom, when a clear and continuous habit of doing certain actions has grown up under the ægis of the conviction that these actions are legally necessary or legally right. On the other hand,

³ As to meaning of the phrase "sources of international law," see Lawrence, *Principles of International Law*, 4th ed., pp. 97 and 98; see also Oppenheim, *International Law* (1905), p. 22.

jurists speak of a usage, when a habit of doing certain actions has grown up without there being the conviction of their legal character. * * * A certain conduct of states concerning their international relations may therefore be usual without being the outcome of customary international law. As usages have a tendency to become customs, the question presents itself, at what time a usage turns into custom. This question is one of fact, not of theory.⁴

The language of the Supreme Court of North Dakota in *Power v. Bowdle*, 3 N. D. 123, although a decision under purely municipal law, is pertinent in this connection. The court there said:

Usage is local practice, and must be proved. Custom is a general practice, judicially noticed without proof. Usage is the fact; custom is the law. There may be usage without custom, but there can be no custom without usage to accompany or precede it. Usage consists of a repetition of acts; custom comes out of this repetition.

International usages founded upon principles of justice and accepted by the civilized nations of the world as rules which ought to govern their international relations at one time constituted nearly the whole body of international law. A custom in that sense is international law though it has only been tacitly and not expressly agreed to by the civilized nations. Customary international law until modified by the conventional law is as authoritative in the civilized world as the common law of England is authoritative in Great Britain and the United States until modified by statute. On the other hand, a usage simply is not international law at all. It can only be that when it has ripened into a custom. If it has not ripened into a custom, it is of no authority in determining what the existing rules of international law are, though it would be entitled to great weight in the discussion of what the rules of international law ought to be, according to the reasonableness of the usage, the number and importance of the nations which have adopted it and the nearness of its approach to the principles of justice.⁵

⁴ Oppenheim, *International Law*, p. 22. See also *Elements of International Law*, by Gen. George B. Davis, 3d ed. (1908), p. 23.

⁵ See W. E. Hall, *International Law*, 5th ed., p. 5.

(3-4) Conventional provisions and diplomatic agreements have long been a source of the law of nations, always of the highest weight but until recently relatively unimportant in quantity. The examples of law-making treaties or declarations like those of Paris in 1856, of Geneva in 1864 and of St. Petersburg in 1868 were very few. Even these can not be said to have become immediately a part of international law when first promulgated. It was not, for example, until 1898 that the United States by proclamation and Spain by acquiescence gave practical adherence to the Declaration of Paris. But the growth in relative importance of conventional international law is no less marked in recent years than the growth of international arbitration; in fact they go naturally hand in hand. Happily the Hague Conferences have given us many provisions of a law-making character. Their declarations and conventions already constitute the great bulk of the statutory law of nations. "Whittuck's International Documents — a collection of International Conventions and Declarations of Law-making Kind" consists largely of the work of the first and second Hague Conferences. Professor Lawrence says that

The last two decades have witnessed such a wonderful growth of treaties negotiated for the purpose of making rules binding on all states that the old views and the old controversies have become obsolete and we are able to put in their place a new and generally accepted account of treaties considered as sources of international law.⁶

The great mass of international agreements make no pretense to define the law of nations and are in no sense of a law-making character. Even those treaties to which we look as the sources of the conventional law must be carefully distinguished. Sir Frederick Pollock says:

Treaties and conventions between particular states may define any portion of those rules (the rules of international law) or add to or vary the existing rules, but any conventional rule so laid down is binding only on the parties to it. Acts of this kind may go to show, according to the nature of the case and the particular circum-

⁶ Lawrence, *Principles of International Law*, 4th ed., p. 101.

stances, the existence of general usage which the parties wished to record for convenience in apt words and in authentic form (though this is not common), or the dissatisfaction of the parties with existing usage and their desire to improve on it, or the absence of any settled usage at all antecedent to the particular agreement. It is therefore impracticable, with one exception to be mentioned, to make any general statement as to the value of treaties and similar instruments as evidences of the law of nations. The exceptional case, which is of increasing frequency and importance, is where an agreement is made not by two or three states as a matter of private business between themselves, but by a considerable proportion, in number and power, of civilized states at large, for the regulation of matters of general and permanent interest.⁷

An interesting question arises whether these great international declarations and conventions, the work of conferences like those of the Hague and the recent one in London, must be adhered to by all the Powers before they can be treated as a part of the law of nations, or if not, when and under what circumstances they may begin to be so considered. Although it may still be true, as it was when Wheaton wrote the first sentence of his great work on international law, that "there is no legislative or judicial authority recognized by all nations which determines the law that regulates the reciprocal relations of states," we have made wonderful strides in that direction. We now certainly have in our great international conferences something very akin to an international legislature, as we are also approaching very rapidly towards an international judiciary.⁸ The declaration of a conference like that at the Hague or a convention proposed by it and accepted by a considerable proportion in number and power of the civilized states, in the absence of a prompt and effective dissent by some of the greater Powers, must come to be regarded more and more in the nature of an international statute binding upon all.

Professor Wilson in his new work on *International Law* (1910, p. 11) suggests also that "in a less general way the reappearance

⁷ *Columbia Law Review*, Vol. 2, No. 8; see also Hall, *International Law*, 5th ed., p. 7, and Oppenheim, *International Law*, p. 18.

⁸ See Lawrence, *Principles of International Law*, 4th ed., p. 52.

of the same clause in a large number of treaties between two or a few states may indicate the existing law for all." That at least would be entitled to much weight as bearing on what the law ought to be.

(5) Decisions of international tribunals and commissions have increased in importance with the growth of international arbitration. Heretofore there has been a great difference in the relative authority of the decisions of international tribunals and commissions. With the exception of some of the greater international commissions, many of the earlier commissions are not entitled to equal weight with those in the present advanced stage of international arbitration. The decisions of many commissions, consisting of men who at the time had no extraordinary position either as international jurists or publicists and whose decisions indicate more a desire to compromise and balance supposed equities, do not stand on a parity with the great commissions which hew close to the strict line of the law of nations. International arbitrations of below the first order would naturally carry such weight only as come from the character of their reasoning or from the uniformity of the precedents they establish.⁹

We now have a permanent International Prize Court, whose decisions will be authoritative. We shall soon have, we believe, a permanent international court of general jurisdiction, and when we do its decisions will be final. Even now the decisions of the great international tribunals and commissions, and notably the Hague arbitrations, in interpretation and application of either the conventional or customary law, ought to be of the highest authority. It is reasonable to suppose that questions thus tried before a great international tribunal, ably presented by learned jurists after long preparation, and discussed at great length from every standpoint, will thus be decided as wisely and correctly as is possible.

(6) The great publicists were the pioneers in the field of international law, and so long as the law of nations remained almost wholly customary they were its chief source of authority. They held the same place in international law which the great institutional writers held in the common law. Chancellor Kent said:

⁹ See an Appreciation of Arbitration Cases, by Prof. Oppenheim, *American Journal of International Law*, Vol. 2, No. 2, pp. 342 and 343.

In cases where the principal jurists agree the presumption will be very great in favor of the solidity of their maxims, and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law.¹⁰

They were not regarded as making the law, but simply as evidence of it.

Said Mr. Justice Gray in *The Paquete Habana*:

Where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and as evidence of these to the works of jurists and commentators, who, by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their author concerning what the law ought to be, but for trustworthy evidence of what the law really is.¹¹

And Sir Frederick Pollock says that "a century earlier Lord Stowell had relied on Vattel not as lawyer merely delivering an opinion but as a witness asserting a fact — the fact that such is the existing practice of modern Europe."¹²

Not every one who has written a treatise or a monograph on international law is by any means an authority;¹³ but the civilized world yields great, if not implicit, homage to the authoritative writers, the great publicists, because of their high standing, their impartiality, the extent of their historical research and their power of philosophical reasoning. Within their proper domain their authority is as great as ever; but their position is not so exclusive and their relative importance has become less as the importance of

¹⁰ 1 Kent Com. 18, quoted with approval by Mr. Justice Gray in *The Paquete Habana*, 175 U. S. 700 and by Sir Robert Phillimore in his *Commentaries*, p. 64.

¹¹ 175 U. S. 700. See also the language of Lord Chief Justice Alverstone to the same effect in *West Rand Central Gold Mining Co. v. The King*, L. R. (1905) 2 K. B. 391.

¹² *Columbia Law Review*, Vol. 2, No. 8, citing *The Maria* (1799), 1 Rob. Adm., p. 363.

¹³ *American Journal of Law*, Vol. 2, No. 2, pp. 344 and 345.

the decisions of great international commissions has increased and the acts and conventions of the great international conferences have grown more frequent and far reaching. Professor Lawrence says that "there should be something of the judge and something of the philosopher in every writer on international law" and that "in many the qualities of both are happily combined. * * *"¹⁴

As judges of the customary law they still hold a preëminent position, as commentators on the conventional law their opinions are entitled to great weight, and as philosophers they are leading exponents of what the law ought ideally to become.

(7) Diplomatic and other state papers are often very important for tracing historically some doctrine of international law or for its interpretation. Their proper use seems to be of an incidental character rather than as a primary source of international law. There are some diplomatic and state papers which hold a preëminent position. Sir Robert Phillimore, for example, characterized the reply of the British Government to the Government of Prussia in 1753 as generally recognized as one of the ablest expositions of international law ever embodied in a state paper.¹⁵ There are many diplomatic and other state papers in recent years which are entitled to great weight from the standing of the writers and the breadth with which they have discussed the question at issue. It is to be remembered, however, that state papers are generally written in defense of the position of the writer's government and, however broad a view he may desire to take, he is usually in the position of an advocate and such papers as a class have not the impartiality of the writings of publicists or even the *obiter dicta* of judges. But though we may not regard such papers as of the highest authority of what the law is, they furnish much excellent material for the consideration of what the law ought to be, for to our statesmen more than to any other class is due the present great progress in perfecting the law of nations.

(8) The decisions of municipal courts include those of the maritime prize courts and of the general courts which enforce or assume to

¹⁴ Lawrence, *Principles of International Law*, 4th ed., p. 100.

¹⁵ Sir Robert Phillimore, *Commentaries on International Law*, 3d ed., p. 15.

enforce the law of nations. The Anglo-Saxon race attaches greater importance to the decisions of its municipal courts than the people of continental Europe usually accord to theirs. The independence from the executive of the judiciary in Great Britain and the United States, its life or long tenure of office and the custom based upon our practice of setting down the reasoning and grounds upon which the decisions proceed, so that the student of such subjects can see for himself its practical correctness, gives and ought to give to the decisions of the municipal courts of those two countries upon any question which properly comes within its judicial decision peculiar weight.¹⁶ Prize courts of all countries assume to administer a branch of the law of nations, and their decisions with respect to questions properly before them are entitled to great respect. The weight to be given each depends upon many circumstances. For our present purpose, their decisions are of less importance as they pertain for the most part to the laws of naval warfare, whereas the code which the Society proposes for itself is one of peace.

Speaking of the unwritten law of nations, Chief Justice Marshall says:

We consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.¹⁷

In England and the United States the law of nations has been expressly held to be a part of the law of the land.¹⁸ Their courts, therefore, are charged with the administration of the law of nations and their decisions with respect thereto in cases regularly before them are of a truly judicial character. The decisions, for example,

¹⁶ See Calvo, *Droit International*, p. 158; Wilson & Tucker, *International Law*, p. 30.

¹⁷ Marshall, C. J., *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, 198.

¹⁸ See Scott, *Cases on International Law*, Preface; and cases collected in Moore's *International Law Digest*, Vol. 1, p. 3 *et seq.*

of the United States Supreme Court on questions of international law, as announced by some of its great judges, after full argument and deliberate consideration, are certainly of the very highest value within their proper sphere. If the decisions of municipal courts on a given point in different countries are numerous and everywhere the same, they are evidence of a universally recognized rule of international law. If they fall short of that, their weight must depend upon their approach to uniformity, the power of their reasoning and the strength of the courts.¹⁹

(9) The *dicta* of judicial tribunals belong to the same class as the writings and opinions of publicists, but as a whole naturally fall far below them because emanating more often from men who are not trained to the spirit of international law as are the great publicists.

(10) Municipal legislation of itself alone would seem to be of little importance unless the uniformity of legislation upon some subject goes to establish an international usage and be plainly in accord with the principles of justice, in which case it is directly pertinent to the question of what the law ought to be.

Most writers upon the general subject of international law discuss its so-called sources. There does not appear to be much particular discussion, however, of their relative weight. The order in which a writer mentions these sources gives some idea, though far from a perfect one, of his view of their apparent relative importance. There is much variety in the order thus given by different publicists. It might be interesting to note the order given by two of the latest books. Lawrence in his new fourth edition of *The Principles of International Law* (1910)²⁰ gives this order as (1) the works of great publicists; (2) treaties; (3) the decisions of prize courts, international conferences and arbitral tribunals; (4) state papers other than treaties; (5) instructions issued by states for the guidance of their own officers and tribunals. Professor Wilson in his new

¹⁹ See generally a note by Mr. Dana, *Wheaton's International Law*, 8th ed., p. 27; and an interesting discussion of the value of municipal case law by Prof. Oppenheim in the *American Journal of International Law*, Vol. 2, No. 2, p. 336 *et seq.*

²⁰ T. J. Lawrence, *Principles of International Law*, 4th ed., pp. 98-112.

work on International Law (1910)²¹ says that in a narrow sense the chief sources of international law are (1) custom; (2) treaties and other interstate agreements; (3) the decisions of international tribunals; and then that in a broader sense there are also included in the sources of international law; (4) decisions of national tribunals, such as prize courts; (5) opinions of text writers; (6) diplomatic papers.

For the purposes simply of the purely legal side of the proposed code, *i. e.*, as a statement of existing law, the relative value of authorities, speaking generally, seems to be somewhat as follows:

1. Conventional provisions, including diplomatic agreements, of a law-making character.

2. Custom.

Treaties in fact are of no higher authority within their domain than custom is within its, but where the two conflict, custom must give way to treaties and so the latter may properly be put first. Then too the conventional law is fast becoming the most important. These two, and these two only, constitute the law of nations. Conventional provisions ordinarily speak for themselves, but the customary law is a question of fact. For evidence of what the latter is and for the interpretation and application of both we must look to

3. Decisions of international tribunals and commissions, and especially those of The Hague;

4. Decisions of municipal courts;

5. Writings of publicists;

6. Diplomatic and other state papers.

On the other hand, having regard to the second feature of the proposed codification, *viz.*, the codification of ideal rules, we naturally have a very different order. We may exclude conventional provisions of a law-making character and customs, as they express only what the law is. We may also largely exclude the decisions of international tribunals and commissions and the decisions of municipal courts, as they ordinarily attempt to say what the law is and not what it ideally ought to be.

²¹ George G. Wilson, International Law, p. 9.

In considering the ideal rules not yet established as law, but which it would be desirable to establish, the relative value of the helpful sources would seem to be:

1. Usage, *i. e.*, those great usages which have not yet become established as custom and yet are so founded in reason and justice that they ought to be. Usage in this connection has recently become of unique importance because there are so many important practices quite generally established by single treaty to which many nations are a party or by the repetition of the same provision in many treaties, and yet which fall short of that general acceptance by the civilized world which make them a part of international law.

2. The writings of publicists, who have always been the pioneers in the formative process of international law.

3. Diplomatic and other state papers.

4. Municipal legislation.

In concluding these brief observations upon the relative value of authorities it must be borne in mind that no classification of their relative value can be made that is not so subject to exceptions as to make it of little practical value. The *dicta* of some judges may in fact be worth more than the decisions of some international tribunals. The Committee on Codification, with that discriminating sense which characterizes the judicial mind, must, after all, attach such weight to each authority for each particular rule or purpose as seems to it right, regardless of any general classification which might be made.

ADDRESS OF MR. JACKSON H. RALSTON, OF WASHINGTON, D. C.,

ON

The Value of Authorities in International Law.

The preliminary report of the Committee on Codification¹ contains the following:

¹ Proceedings for 1910, p. 201.

RELATIVE VALUE OF AUTHORITIES

There should also be considered critically and declared the relative value which should be given to authorities relied upon in defining and formulating in terms an abstract principle of justice or a rule of international conduct. Such a consideration and declaration should include, in more or less detail, (1) Custom, (2) Usage, (3) Conventional Provisions, (4) Diplomatic Agreements, (5) Decisions of International Tribunals and Commissions, (6) Writings of Publicists, (7) Diplomatic and other State Papers, (8) Decisions of Municipal Courts, (9) Dicta of Judicial Tribunals, and (10) Municipal Legislation. It would be appropriate also to discuss at some length the proper force and authority to be given to Precedent in the determination of the rules, and its relation to Custom and Usage.

To trace historically, to analyze profoundly, all that directly or indirectly is implied in the suggestion of the committee, would involve the study of the growth of law itself as a science, and of international law as a branch of that science. International law is but a part, albeit an important one, of the infinitely greater field of learning, developing, though as a laggard, with its broader development, clarifying itself, as does law in general, by repeated applications to particular instances, and with a future more speculatively alluring, more appealing to the imagination, than is offered by any other branch of that science which determines the relations of man to man and men to men, whether moving as single individuals or as organized bodies, of whatever size. The great issues of war and peace, of national good or ill, of the things which make for the well-being of mankind, in its largest units, belong to this domain. The special dignity which attends the forward march of organized multitudes of the human kind to no small degree attaches to the science which aims to circumscribe, control, direct and develop their movements with relation to other like organizations.

Limitations of time and space forbid us from making the exhaustive study the committee's recommendations might well demand. We must confine ourselves to a brief and, of necessity, inadequate consideration of the sources of international law, and settle as best we may the respective weight to be given to their teachings.

According to eminent authority (as, for instance, Oppenheim) there are no true sources of international law save custom and convention, all the other titles enumerated by the committee being simply of value as furnishing evidence of what the custom may be, but not themselves being true sources of the mystical thing called Law.

Mérignhac distinguishes between the primal direct sources of law, such as custom and convention, and the indirect sources, among which he finds parliamentary papers, including minutes of conferences, discussions in parliaments, notes of chancelleries, circulars, etc., which furnish evidence of usage, and national legislation and jurisprudence, decisions of international tribunals, and doctrines of internationalists.

Still other writers, enumerating the sources to which references have been made, do not undertake to classify them, at least in any careful manner, as to their character, whether original or secondary.

In our consideration of the matter, let us remember that a very perfect parallelism exists between the growth of international and other forms of law (and any ignoring of this fact is equivalent to the brushing aside of experience gained in better developed fields of learning), and that conventions, as the term is used in international law, are the exact correlative of statute law, custom being in essence like to the unwritten or common law of the individual nations, which is sometimes based upon real usage and sometimes law made by the judges.

Thus premising, let us first consider together—

(1) CUSTOM; (2) USAGE.

In general, custom and usage are treated as synonymous. In discussing this branch of law, usage is regarded as the practice of individual nations, which, when and as it gradually broadens by general acceptance among all nations, furnishes fixed rules of international law. Reaching this stage, usage hardens into customs, to the exercise of which all nations are agreed.

Ordinary usage or custom may or may not have an ethical sanction. If it has such a sanction, generally accepted, we may believe that its permanence is little open to question. Let it be always

understood, however, that even ethics, as doubtless later developments will show, has not said its last word. The conduct which in one generation is endorsed as ethical, save by an unconsidered remnant, is by a later generation universally rejected as an infraction of the rights either of individuals or of nations. The reduction of an enemy to slavery, once tolerated by international law as then understood, is today condemned. The destruction of a nation's existence, once permitted, is today internationally an ethical murder. That in the future the law of nations will undergo like advancement, is not to be doubted. We may discover, for instance, that international slaughter is no more ethically justifiable than is private murder, and should this stage be reached, so much of international law as treats of the relations of nations in time of war may become as obsolete as is today the special learning of courts with relation to private slavery.

The rules of international law which have gone from usage to custom, having no ethical sanction, existing merely as rules of convenience, possessing peculiar value as related to existing conditions, are also sure to develop and change to meet new situations. Nevertheless, all customs, whether based upon ethics, as we now understand it, or upon convenience, are of the highest importance, and rightly to be classed as possessing as great a degree of fixity as may be accorded to any particular development of international law, and therefore affording much of the best material for purposes of codification.

We now discover the close interrelation between the different branches of our subject. How may we know when usage exists, when it has become customary, save by reference to conventions, diplomatic agreements, decisions of international tribunals, writings of publicists, etc., all of which serve as evidences to prove usage and establish custom? Custom and usage are not things apart, the existence of which "jumps to the eyes," to use a Gallicism.

(3) CONVENTIONAL PROVISIONS; (4) DIPLOMATIC AGREEMENTS.

These two headings may be considered together. Fortunately for the study of the codification of law, the material furnished by conventional agreements is growing apace. The Declaration of Paris

and other documents of general acceptance, and the Hague Conventions afford us a mass of international law, the sanction of which there is none left to question. All the great nations of the world, and most of the small ones, have given their express approval to the propositions in them laid down. It is not for us to alter or change them, though their meaning and application may always be considered. As to this body of law, aside from the consent governments have manifested to its acceptance, we have knowledge of the fact that its framers were men of the utmost distinction, familiar with the trend of international law in general, and admirably adapted to be, as they were, its exponents.

Of diplomatic agreements less can be said. Ordinarily they serve a temporary purpose and cease to have value with the passing of the emergency calling them into existence. The fact that in given classes of circumstances certain expedients or methods of treatment are customarily resorted to, would impress the mind with the idea that thought is, as to their subject-matter, crystallizing in certain directions, but they lack much of the persuasive effect to be accorded to conventional provisions.

(5) DECISIONS OF INTERNATIONAL TRIBUNALS AND COMMISSIONS.

There is to-day growing up a body of precedents which is of value, both as a positive source of international law and as furnishing elucidations of accepted propositions. We may believe that courts are more than expositors of international law. They are creators. They are the sources of law. We are all familiar with the idea in the municipal forums that judges are not law-givers, their duty being merely to expound the law which they derive from an unnamed and undiscoverable source; that law pervades the universe, and that the judge, by stretching forth his hand in some mysterious manner, extracts as if from the ether principles applicable in the particular case; that these principles have always existed, waiting and ready to be fashioned into some shape intelligible to human beings.

The idea is mistaken and illusory. The law of municipal courts touching a novel problem is either the conclusion of the judge as to the teachings of right reason under given circumstances, or it is the

dogmatic judicial declaration that, granted a certain class of facts, the rule controlling their relations is or thereafter shall be, as he lays it down.

In the first instance, the judge seeks an ethical basis for his declarations and his conclusions are just or otherwise, according to the degree of his intelligent moral apprehension, or of the moral advancement of the community in which he lives.

In the second instance he may declare that certain pre-existing customs control, in which case his declaration is more or less persuasive evidence of the actuality of such customs, or he may declare that a certain rule shall prevail in given instances, regardless of the fact that there is no evidence that theretofore such rule has existed. In the latter case he becomes veritably a law-giver, and in so doing he may be governed by his conception as to the demands of ethics under the circumstances of the case, or he may be laying down simply what he esteems to be such a rule of convenience as will satisfy, or at any rate not run counter to, the common sense of the community. His action becomes a precedent, and, accepted as proper by those who follow, and no counter-rule being insisted upon, a custom is finally evolved which furnishes the true basis of a principle of law.

It is, therefore, the fact that in the realm of municipalities, the courts, through the decrees of the judges, are a source of law. It will be true internationally — is becoming true, in fact — that international commissions and tribunals are furnishing us a positive source of international law. For we have absolutely no reason to suppose that there is any intrinsic difference between the past or future methods of development of different branches of this science. Each branch has the common basis of the relation of man to man, each must be worked out by the same instrumentality, — men — and is made known through like material agencies, agreements, practices, opinions of writers and of men in positions of authority.

But recurring to our particular sub-head, we will grant that the idea of *stare decisis* is not recognized as a principle among courts of international law. They have so said repeatedly, as I have had occasion to remark in "International Arbitral Law and Procedure." ²

But the same doctrine is declared by the civil law courts. Yet, if it were true, as stated by them in the broadness of the language used in making the assertion, there would be no occasion for the digests and pandects with which the civil law is coming to abound as much as the common law. The greatest civilians, in order to determine the customs of a country with regard to a given subject-matter, would not search these volumes as they do, were it not that, after all, later civil law courts do regard the adjudications of earlier ones with increasing concern.

That at the present time the influence of *stare decisis* in national tribunals should be greater than in international ones, we are inclined to believe after casual consideration. The nation presents an approximately homogeneous whole; one court is composed of men accustomed to the modes of thought common to the men of another court under the same flag. The institutions which may be considered as parallel to that of the judiciary are in all instances in detail the same.

When we in turn view the arbitral courts, we find different conditions prevailing. As a rule, their membership is temporary. They are drawn from different countries. They, or their heads, are educated subject to varying ideals and are controlled by different methods of thought. Withal there may exist a certain unconscious jealousy of the authority of the utterances of other men, whom they may consider no more learned, no more competent than themselves.

Nevertheless, when we examine the now large body of arbitral opinions, though we find differences and on certain points striking ones, they are, after all, no more dissimilar or diversified than are the opinions of judges in the various States of the American Union. For this a reason may be found. All must appeal to common sources of knowledge for information — the conventional law which has received international acceptance, customs as established by publicists, by preceding arbitrations, etc., the teachings of municipal law. From the last named they will learn to apply internationally such universally accepted principles of municipal law as are for instance embraced in the doctrines of agency, *res judicata*, and

others. Through such tribunals international law is put into play, and from its actions and reactions new principles are educed, no less important and readily accepted and no less authoritative than those theretofore recognized.

We have referred to differences of opinion as to the teachings of international law among arbitrators, which differences leave questions for codifiers to solve. For instance, at Caracas every American arbitrator held that in principle, save for obvious derelictions of duty, governments were not to be held responsible for the acts of unsuccessful revolutionists. Every European (save the English, whose attitude first favored the American and afterward the Continental view) held that responsibility existed in all cases. Doubtless the advocates of either view were controlled largely by national history or tendencies or declared governmental policies. Again, differences existed as to the controlling law of inheritance, whether that of the nationality of the deceased, or of the *situs*. These questions, it is to be believed, await final solution, although, as to the first, almost universally governments are absolved from liability.

But in arbitrations we are entering upon a new era. Nine cases have been passed upon by the Hague Permanent Court of Arbitration, and in but two have there been any dissents. These decisions have afforded a nucleus of positive, judicially-declared international law, and the utterances of this court will, we may believe, grow in weight and influence. Its determinations codifiers must accept in their entirety, not perhaps because it is thought that in every instance abstract justice has been attained, but at least because no higher authority — save convention — exists.

Let us enumerate the several judicial authorities in the diminishing order of their importance.

First in weight for reasons given comes the work of the Hague Court.

Next we may rank the determinations of the great international commissions, such as the Geneva Tribunal settling the Alabama claims. We place this next because of the number and distinguished character of its members, and because but one citizen or subject among five arbitrators sat on the court for each of the contending

parties, and the determinations of the tribunal were not materially influenced, therefore, by the fact that virtually parties in interest helped to adjudge a cause in which they were concerned.

Next we may place those of mixed commissions upon which the umpire was from a disinterested nation, whether he sat as a coordinate member or virtually constituted an appellate court.

Last, we place those tribunals consisting of but one man, whose conclusions should be given simply such weight as his distinguished character or the solidity of his reasoning may justify.

We have not specially classified the arbitral decisions of sovereigns or of joint commissions upon which have sat an equal number of the nationals of the contending parties, the first because of the political considerations so largely controlling their action, and the second because of the fact that the results of their labors represent often more or less skillful bargaining rather than the triumph of abstract principle. For these reasons, slight weight attaches to either class, and they afford the codifier little assistance.

(6) WRITINGS OF PUBLICISTS.

We must consider the writings of the most eminent publicists as scarcely less informing, in a large way, than are the utterances of the better classes of arbitral tribunals. None of us will fail to recognize the important influence exercised by Grotius, Pufendorf, and Vattel, with their followers, in the formation of international law. When we find these great leaders constantly appealed to as authority for the positions of national and international tribunals, and furnishing inspiration to statesmen, diplomatists, and later publicists, we must recognize that they have done more than simply to classify and record customs. Their functions have been scarcely less important than those of present day arbitral tribunals. They have pointed out true international law, and their directions have, to a material extent, given substance to such law, as we now know it. That they have been law-givers can hardly be denied, and if they are such, their works are sources of the law. Their relative rank in their field is no less than the rank of Coke and Blackstone in the common law. A codifier who would understand the subject he

desires to reduce to system, who would comprehend all of its relations, may not ignore or underrate them.

Of more modern writers none can be found occupying the same eminent positions. In the multitude, we discover many writers of about the same standard of excellence. In the examination of their works another method must be adopted. Where all unite upon the same principle, if indeed there be unity of opinion upon any important one, it may be accepted conclusively as an existing fact in law. In other cases, weight of numbers and rank, if at least supported by reason, will prevail. Withal, attention must be given to the education and political entourage of the authors, few men rising very far above the level of thought surrounding them. Reactionary tendencies among such authors will be recognized and avoided.

No absolute rule, however, can be laid down as determining the weight to be given to the utterances of our modern writers. These will always be regarded critically and treated not as being in themselves sources of the law in any true sense, but rather as aids to reason, lighting our paths, but not directing our footsteps. We may, therefore, treat as an important branch of our present sub-head, the codifications or declarations of law formulated by important bodies of internationalists, such as those included within the Institute of International Law. When these gentlemen have devoted themselves to the elucidation and clarification of branches of international law, the results of their work furnish the highest possible evidence either of what international law is or should be made to be. The most emphatic proof of this suggestion is furnished by the Hague Convention for the Pacific Settlement of International Disputes. The whole subject therein embraced had for years prior to the Conference of 1899, received the most careful attention of the Institute of International Law, the labors of whose members produced a scheme ready at hand for the Hague Conference, and largely availed of by it even to the smallest details. The Institute and other like bodies have, therefore, contributed largely to facilitate our labors.

We will not overlook or under-estimate the work of our great predecessors as codifiers, notably Field and Bluntschli, who have blazed a broad trail for us to follow.

(7) DIPLOMATIC AND OTHER STATE PAPERS.

As a source of international law, it is unfortunately true that diplomatic and other state papers must be given scant value. Even those whose experience in international law, as laid down by foreign offices, is limited, must be brought to the conclusion that the labor of these offices is comparable not to that of judges or of presumably impartial authors, but to that of advocates. Thus we find as exigencies demand that at one time a given rule is accepted and at another rejected by the same foreign office, which offices prefer to rely upon such apparent developments of international law as they believe comport best with the momentary or permanent policies of the government.

We would err, therefore, if, as a rule, we gave to state papers greater credit or authority than in the general practice of the law, we would grant to the argument of attorneys. We should simply accept them as valuable for the industry displayed in their preparation, for the wealth of illustration they may contain, and, after all, sit in judgment upon them much as does the court upon arguments of opposing counsel.

It is notable, however, that our State Department gave the greatest impetus to the idea of "free ships, free goods," a doctrine now of wide acceptance, and its history with relation thereto is interesting and important. Nevertheless, at about the same time the Department was advocating this view, it was vigorously contending for the absolute right of Americans to sell arms and ammunition to all belligerents, a doctrine which in a court of ethics, at least, may not be expected to prevail. If in a private feud third parties are not at liberty, without moral reprobation and criminal liability, to sell deadly weapons to either party, knowing the purpose to which they are to be put, so nations may not pursue a like course without ultimate condemnation. The fact that it is the citizens who are permitted to sell, and not the nation which acts as vendor, will not in the long run relieve the government from its just responsibility. The codifiers should not, therefore, place alleged business interests above sound morality, however eminent may be the departmental authority cited for such course.

(8) DECISIONS OF MUNICIPAL COURTS;

(9) *Dicta* OF JUDICIAL TRIBUNALS.

As instructive upon international law, we must class the opinions of municipal courts and often their *dicta* as higher than those of modern law-writers and about on a par with the better class of arbitral tribunals. We will give them this rank because their conclusions are not so often, as are those of law-writers, evolved from their own inner consciousness, but are rendered luminous by the conflict of minds of the advocates before them, and tested under the white heat of debate. The possible errors of the positions of contending parties have been examined and have brought out what competent men treat as the truth and that which we may generally so regard. We will, nevertheless, guard ourselves against what, for the want of a better term, we will call the "national equation," as distinguished from the "personal equation" — that national history and training which leads the national of one country to approach a given question from one view-point rather than from another.

Special value will be given to the decisions of the Supreme Court of the United States upon propositions of international law. This for the reason that more than any other national tribunal, the Supreme Court has had occasion to pass upon conflicts of States which were to a large degree sovereign within their limitations, and to apply between them the law of nations. The Supreme Court, therefore, has been a prototype of the Hague Arbitral Tribunal, and its labors are frequently and properly cited as indicating the competency of a court to settle disputes between sovereignties, whatever may be the character of the differences.

(10) MUNICIPAL LEGISLATION.

It is not at all clear that anything of great value to our codifiers will be found in municipal legislation. National legislatures may only crystallize law whose force has territorial limits. They do not purport to declare rules to which other nations must bow, although in the present state of the world they are so far controlled by the voice of the world that they may not live for themselves alone. They can no longer be "hermit" nations.

It is much to be feared that the most municipal legislation has done for international law is, through its contradictions, to furnish abundant literature and problems presenting conflicts of law to be solved by internationalists.

(11) FINAL CONSIDERATIONS.

We have finished, although under severe limitations of time and space, the immediate task set before us, but must conclude that we have only sketched hastily and imperfectly the barest outlines of the work before the codifiers in their investigation of the sources of international law. One salient feature has, however, been developed. Those who would codify must have a very extensive, and preferably a very practical, experience covering the whole field of international law, and they must possess a genius given to but few, that is, a mental penetration which will enable them, in the face of contradictions and uncertainties in the mass of relevant and irrelevant material, to uncover the principles which bind all things together, and despite all confusion, must, and hereafter shall, control.

SUGGESTIONS CONCERNING PRELIMINARY REPORT ON CODIFICATION.

By Prof. Paul S. Reinsch, of the University of Wisconsin.

I would suggest that the distinction between primary and secondary attributes of the state be not used. The distinction has no importance in practice and no standing in scientific thought. The jurisdiction of a state over territory and persons is certainly as important or fundamental as the so-called attribute of equality. An additional disadvantage of this classification is that it gives undue prominence to things which are of purely theoretical importance.

The simplest and the most satisfactory method of arranging the general divisions would seem to me to be the following: Introduction; Part One, States as the Subjects of International Law; Part Two, Jurisdiction over Territory and Property; Part Three, Jurisdiction over Persons; Part Four, International Intercourse and the Regulation of International Society; Part Five, Procedure in Claims and Arbitration.